

## CITY AND COUNTY OF SAN FRANCISCO



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October 9, 1997

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: In the Matter of Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities

WT Docket No. 97-197

97-197

Dear Mr. Caton:

Enclosed please find an original plus nine copies of comments to be filed in this proceeding on behalf of the City and County of San Francisco.

Please distribute a copy of each set of comments to each Commissioner. Thank you for your assistance.

Very truly yours,

LOUISE H. RENNE  
City Attorney

JULIA M. C. FRIEDLANDER  
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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of: )  
Procedures for Reviewing Requests for Relief )  
From State and Local Regulations Pursuant to )  
Section 332(c)(7)(B)(v) of the )  
Communications Act of 1934 )

97-192  
WT Docket No. 97-197

Guidelines for Evaluating the Environmental )  
Effects of Radiofrequency Radiation )

Petition for Rulemaking of the Cellular )  
Telecommunications Industry Association )  
Concerning Amendment of the Commission's )  
Rules to Preempt State and Local Regulation )  
of Commercial Mobile Radio Service )  
Transmitting Facilities )

# COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

The City and County of San Francisco ("the City") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The City has a direct interest in the matters addressed by the NPRM. Since adoption of the Telecommunications Act of 1996, the City Planning Department has received more than eighty applications for permits to install personal wireless service facilities. The City's processing of every application is potentially affected by the Commission's proposed rules regarding relief from local zoning actions pursuant to Section 332(c)(7)(B)(v). In addition, the City has monitored compliance with the Commission's standards for human

exposure to radiofrequency emissions ("RF Standards") for more than a year. The City's existing monitoring program was adopted after review and discussion in many meetings before the City's Planning Commission, Health Commission and Board of Supervisors. Public testimony was offered by many industry representatives and by citizens concerned about their health and safety. The Commission's proposed rules regarding RF compliance monitoring would interfere with the City's existing compliance monitoring program.

These comments briefly present the City's views regarding the procedures for review of local zoning decisions under 47 U.S.C. §332(c)(7)(B)(v). The City agrees with the more comprehensive discussion of these issues in the comments filed in this proceeding on behalf of the National League of Cities (NLC) and the National Association of Telecommunications Officers and Advisors (NATOA). These comments also present the City's views regarding compliance monitoring.

1. Procedures for Review of Local Zoning Decisions Under §332(c)(7)(B)(v) of the Communications Act.

The City urges the Commission to reconsider the conclusions identified as "Definitional Issues" in paragraphs 135 through 141 of the NPRM. These conclusions misconstrue the statute and its legislative history in several ways.

First, the Commission proposes a definition of the term "final action" that would allow Commission review of local zoning decisions before they, in fact, become final at the local level. NPRM, ¶137. The proposed definition relies on a misreading of the legislative history. In paraphrasing the Conference Report language found at page 209, the NPRM omits two critical words: "State court." The Conference Report explains Congressional intent to

allow for Commission review of local zoning decisions without requiring the petitioner to exhaust *State court* remedies. The legislative history does not indicate any Congressional intent to bypass *administrative* appeals at the local level. The Commission's proposed definition of the term "final action" misreads the legislative history and conflicts with common law doctrines of ripeness and exhaustion of administrative remedies.

Second, the City agrees with the Commission's conclusion that whether a local government's "failure to act" is reviewable pursuant to Section 332 (c)(7)(B)(v) must be considered on a case by case basis. However, like the NLC and NATOA, we question the purpose of the Commission's inquiry into the "average length of time it takes to issue various types of siting permits." NPRM ¶138. Local zoning decisions are subject to a variety of time-constraints established in local and state laws. No information about averages is relevant to the required inquiry in any particular case.

Third, the City agrees with the NLC and NATOA that the Commission should not grant relief from a final action or failure to act that is based only partially on the environmental effects of RF emissions. No purpose would be served by a purely symbolic Commission action to *partially* preempt a local zoning decision.

Finally, the City is disturbed by the Commission's proposal to review local zoning decisions which are not, on their face, based on the environmental effects of RF emissions. We see no reason why the Commission should disturb the widely accepted common law rule that public officials are presumed to act in accordance with their official duties and applicable law. It is especially disturbing that the NPRM adopts a position of official distrust toward the actions of (often elected) local officials while *presuming* that the Commission's industry licensees will install and operate facilities in compliance with the Commission's RF Standards.

## 2. Demonstration of RF Compliance

The NPRM requests comment on two proposals, each of which would limit the activities of state and local governments to evaluate whether particular facilities, as proposed, installed and operated, comply with the RF Standards. Both of these proposals would interfere with state and local efforts to provide meaningful assurance to the public that facilities installed within a community comply with the Commission's RF standards.

The first proposal would prohibit state and local governments from requiring providers to submit anything other than a written certification of compliance with respect to facilities that are categorically excluded from environmental assessment under the Commission's rules. With respect to facilities that are not categorically excluded from environmental assessment, the first proposal would only allow state and local governments to obtain documents submitted to the FCC regarding RF emissions during the FCC licensing process. This proposal is described as "a more limited showing." NPRM ¶143.

There are two significant problems with this proposal. First, the purpose of the RF Standards is to protect the public health and safety. While the Commission is free to adopt a regulatory approach that relies on self-certification by providers, state and local governments should not be prevented from requiring that operators actually *demonstrate* that their facilities comply with the RF standards. It is not unreasonable for state and local officials to distrust a self-certification process when personal wireless facilities are being constructed according to timelines that are dictated by intense competitive pressures.

Second, under existing regulations and practices governing personal wireless services, the Commission issues only a blanket license to service providers; individual transmission facilities are not separately licensed by the Commission. The Commission therefore collects

no site-specific information regarding the installation of personal wireless service facilities.

The Commission does not collect any information about other sources of RF emissions at a particular site or any information about how access to the facilities at a particular site – and therefore human exposure to RF emissions – will be controlled.

Site-specific information is critical to any evaluation of whether a particular facility actually complies with the RF Standards. The information regarding RF emissions submitted to the Commission during the licensing process demonstrates only that a provider's equipment is *capable* of complying with the RF Standards. It does not demonstrate that the particular equipment proposed is installed and operated in a manner that actually *does* comply with the RF Standards. As a result, to the extent that the first proposal categorically exempts some facilities from any local review and requires state and local governments to rely on documents submitted to the Commission for review of other facilities, it provides for a meaningless additional layer of regulatory oversight.

The second proposal would provide for a somewhat more meaningful review by allowing for *demonstration* of compliance rather than just certification of compliance. NPRM ¶144. However, state and local governments would only be able to require a demonstration of compliance with respect to facilities that are *exempt* from environmental assessment under the Commission's rules. This proposal is confusing. It is difficult to understand why state and local governments should be able to require a more substantial demonstration of compliance with respect to facilities that pose the *lowest* risk of creating a hazard to health and safety. State and local governments should be free to require documentation of compliance with respect to *all* personal wireless facilities.

The Commission's non-binding policy statement on documentation that may be included in a uniform demonstration of RF compliance suggests many useful forms of documentation. NPRM ¶146. However, the notion of a "uniform" compliance demonstration raises as many questions as it answers. Two questions illustrate this problem. First, does the Commission intend to prohibit state and local governments from following up on information submitted by providers? Under the proposed "uniform" compliance demonstration, could a state or local government send inspectors to a facility to investigate whether conditions at the site conform to the conditions described in the compliance demonstration documents? Could a state or local government require further documentation in response to a complaint from a neighbor alleging that conditions at the site have changed?

Second, could a state or local government require periodic submission of updated information? Could a provider be required to provide documentation whenever any conditions at the site change that could potentially affect human exposure to RF emissions? Could a state or local government require periodic review and documentation of the conditions at the site that affect RF emission exposure?

The City of San Francisco has monitored compliance with the Commission's RF Standards for more than one year. As described in further detail in the attached declaration of Richard J. Lee, the City's compliance monitoring includes three key components: 1) Permit applicants are required to submit an engineering report with the permit application which describes the anticipated RF conditions at the site; 2) Permit applicants are required to submit a project implementation report documenting RF emission levels when the facility becomes operational; and 3) Permit applicants are required to submit a subsequent certification of continued compliance every two years while the facility remains in operation.

Although this process may appear cumbersome, it was designed to *facilitate* the siting process. The initial engineering report enables the City to identify problems with a proposed site that may be difficult to remedy without significant modifications. This initial review prevents operators from investing significant resources developing sites that are unlikely to receive final approval. The project implementation report and periodic subsequent certification are designed to ensure concerned residents that facilities are actually installed and operated in accordance with the applicant's proposal and that actual RF emissions do not exceed anticipated levels.

As Mr. Lee's declaration describes, the City's monitoring process has hardly been duplicative of Commission requirements. Mr. Lee has received numerous permit applications that identify the potential for human exposures exceeding the RF Standards. In some cases, these permit applications were disapproved. In most cases, mitigation measures were sufficient to protect area residents. For state and local officials faced with daily expressions of concern about the health effects of RF emissions, San Francisco's experience with compliance monitoring demonstrates why it is critical for local governments to retain authority to conduct meaningful monitoring of compliance with the RF Standards. The NPRM proposes to deny state and local officials this role, for which they alone are suited and which would otherwise be neglected.

Respectfully Submitted,



BY: Julia M. C. Friedlander  
Deputy City Attorney  
1390 Market Street  
San Francisco, CA 94102

Declaration of Richard J. Lee, M.P.H., C.I.H., C.S.P.  
in Support of Comments  
on Behalf of the City and County of San Francisco  
In Response to Notice of Proposed Rulemaking RM 85-77

I, Richard J. Lee, do declare:

1. I serve as a Senior Industrial Hygienist in the San Francisco Department of Public Health's Bureau of Environmental Health Management. I have worked for the Department of Public Health for ten years. I received a Master's degree in Public Health from the University of California at Berkeley in 1979. I have been certified by the Board of Certified Safety Professionals and the American Board of Industrial Hygiene.
2. I am the program manager for the Bureau of Environmental Health's Special Projects program. As program manager, I supervise staff who respond to hazardous material incidents. In addition, I am responsible for disaster planning, oil spill planning, and responding to other hazards created by environmental toxins.
3. In early 1996, the San Francisco Department of Planning began developing guidelines to govern the siting of wireless telecommunications facilities within the City and County of San Francisco. During this process, the Planning Commission received testimony from members of the public concerned about the health effects of radiofrequency (RF) emissions.
4. I was assigned to investigate these concerns and to assist the Department of Planning with developing wireless siting guidelines. My particular role was to recommend measures to protect the public from any health hazards that may be created by exposure to RF emissions generated by wireless telecommunication facilities. Industry representatives contacted me regularly and participated actively in the development of the Planning Department's wireless guidelines. When the Telecommunications Act of 1996 was adopted, the Department of Public Health determined to limit its activities, consistent with federal law, to monitoring the compliance of facilities with the FCC's standards for human exposure to RF emissions ("RF Standards").
5. The Planning Commission adopted wireless facility siting guidelines in May, 1996 and amended the guidelines in August, 1996. These guidelines set forth location preferences for installation of facilities in seven prioritized categories. The guidelines also establish requirements to minimize the visual, noise and thermal effects of transmission facilities and to minimize the intrusion of facilities into open space.
6. The Planning Department's wireless siting guidelines include three principle requirements to ensure that facilities comply with FCC standards for human exposure to RF emissions:

- a. Each permit application must include an engineer's report that identifies other telecommunications facilities on the site which may generate RF emissions, identifies the estimated existing levels of RF emissions at the site, and estimates the RF emissions to be generated by the facility proposed to be installed.
  - b. After installation of a facility, each permit applicant must submit a project implementation report, prepared by a certified professional engineer, which: 1) identifies the three-dimensional perimeter around the facility at which FCC standards for human exposure to RF emissions may be exceeded; and 2) documents testing demonstrating that the facility will not cause human exposure to RF emissions that exceed applicable FCC standards.
  - c. Every two years, the permittee must submit a certification by a licensed engineer that the facility remains in compliance with applicable RF Standards.
7. To the extent necessary to ensure compliance with the RF Standards, an applicant may be required to modify the proposed placement of the facilities on the site, to install fencing, barriers or other appropriate structures or devices to restrict access to the facilities, and/or to install signs in English, Spanish and Chinese to notify persons that the facility could cause exposure to RF emissions.
  8. I am responsible for reviewing permit applications and project implementation reports to ensure that wireless telecommunication facilities are installed in such a way as to comply with the RF standards. Where necessary, I conduct site visits to evaluate the conditions described in permit applications and project implementation reports. I forward my approval or disapproval of each permit application to the Planning Department.
  9. Since the Planning Department's guidelines were adopted, I estimate that I have reviewed 100 applications for a permit to install wireless telecommunications facilities. I estimate that I have conducted approximately fifteen site visits to confirm the conditions described in permit applications and project implementation reports.
  10. Most wireless telecommunication facilities in San Francisco are installed on rooftops or mounted on buildings. I do not recall reviewing any application in which RF emissions were anticipated to exceed the RF Standards at ground level. However, a rooftop facility creates the potential for human exposure exceeding the RF Standards where it is possible to obtain access to the roof. In some cases, access to the rooftop is *required* to ensure adequate egress from the building in the event of fire. In other cases, access to a rooftop is used for recreational purposes. In many cases, access to a rooftop is required for building maintenance purposes. A rooftop facility may also create RF emissions exceeding the RF Standards on the upper floor of the subject building. Finally, because of the density of development in San Francisco, a rooftop facility could cause human exposure to RF exceeding FCC standards on adjacent rooftops or within adjacent buildings.

11. In reviewing applications for permits to install wireless telecommunications facilities in San Francisco, I have found wide variation in the potential for human exposure to RF emissions at levels exceeding the FCC standards. In many cases, the nature of the facility or the conditions of installation provide no risk of human exposure exceeding the RF Standards. In other cases, permit applications indicate that RF emissions generated by the facility may exceed the RF Standards at a distance of 10 or more feet from the transmitter. I estimate that engineering reports submitted in connection with approximately 40-50 permit applications have identified the potential for human exposure exceeding the RF Standards if no mitigation measures are adopted.
12. I disapproved an application to install facilities on the United States Post Office located at 101 Hyde Street. The engineering report submitted with the application contained the following conclusion from a local engineering firm, Hammett & Edison: "The maximum ambient RF levels at the roof level from the proposed operation are estimated to exceed the applicable public limit out to a distance of 16 feet from the "Voice Now" transmit antenna and 13 feet from each of the three "Core" antennas. The calculated three-dimensional perimeter of RF levels equal to the exposure standards extends outward from each transmit antenna and downward into the post office building. . . ." The permit applicant modified their proposal. I approved an amended application which did not project emission levels exceeding the RF Standards within the Post Office building.
13. I disapproved another application to install new facilities on the roof of 2145 19th Avenue where existing facilities were already operated by another carrier. The engineering report submitted with the application contained the following conclusion from a Hammett & Edison engineer: "The ambient RF levels at roof level from the proposed operation are estimated to be in excess of the applicable public exposure limit." At the time this report was prepared, no controls had been implemented to control or warn of high RF emission exposure. The permit applicant has indicated their intent to adopt appropriate mitigation measures. I expect to review the project implementation report documenting these measures.
14. My approval of many other applications has been contingent on specific measures to prevent human access to the proposed facilities. For example, in connection with a facility proposed to be installed on the roof of the building located at 1015-1019 Ocean Avenue, a Hammett & Edison engineer concluded: "The ambient RF levels at roof level from the proposed operation are estimated to be in excess of the applicable public exposure limit. Measurements after the site is ready for operation will determine the precise extent of such areas, which are estimated not to extend beyond about 10 feet from the . . . antenna." My approval of this proposed facility was contingent on compliance with mitigation measures, recommended by Hammett & Edison, to prevent human exposure within the identified 10 foot exposure perimeter.

15. I have been informed by FCC staff that the Commission has no resources to conduct on-site monitoring of compliance with the RF Standards. In my professional opinion, the City's experience over the last year demonstrates the importance of local monitoring. Permit applications and project implementation reports submitted to the City have identified many instances in which facilities would not comply with FCC standards without mitigation measures. I do not believe such mitigation measures would be consistently adopted were it not for the monitoring the City has required. Nevertheless, the City's monitoring procedures have not been reviewed since they were originally adopted. It is possible that the City's compliance monitoring could be more carefully targeted to likely problem areas. I believe it would be appropriate to evaluate the applications and implementation reports the City has received to date, as well as the Commission's August 25, 1997 Second Memorandum Opinion and Order regarding Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, to consider whether the City's compliance monitoring should be modified in any way. I intend to initiate such an evaluation and to recommend any appropriate changes to the City's current monitoring practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 9, 1997

  
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Richard J. Lee